
By TriBar Opinion Committee

I. INTRODUCTION

An agreement in a business transaction typically contains a provision (the “chosen-law provision”) that chooses the law (the “Chosen Law”) of a particular state (the “Chosen Law State”) as its governing law. An opinion letter delivered at the closing of a business transaction by counsel for one party to the other party (a “closing opinion”) usually limits the law it covers to the law (the “Covered Law”) of a specified state (the “Covered Law State”). In any particular transaction, the Covered Law may or may not be the same as the Chosen Law.

In 1998 and 2004 the Committee published reports that discussed how an opinion on the enforceability of an agreement as a whole, a so-called “remedies opinion,” applies to the chosen-law provision in the agreement when the Covered Law is the law chosen by the parties to govern the agreement. Those reports also discussed the separate opinion lawyers sometimes give on the effectiveness of a chosen-law provision when the parties to the agreement have chosen some other law as the agreement’s governing law (a “choice-of-law” opinion).1

Many states have adopted choice-of-law rules based on section 187 of the American Law Institute’s Restatement (Second) of Conflict of Laws (1971) (the “Restatement”) to determine whether a chosen-law provision in an agreement will be given effect.2 Not all states, however, have adopted the Restatement

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2. As used in the text, “based on” does not mean that a state necessarily applies section 187 verbatim. For purposes of analysis, however, this Supplemental Report treats section 187, together with the comments that accompany it, as if it were the law of the Covered Law State. Needless to say, even if a state generally follows the Restatement’s text and comments, opinion preparers should look to applicable case law in preparing an opinion. In addition, depending on the type of transaction, opinion preparers may need to consider the choice-of-law rule in section 1-301 (or former section 1-105) of the Uniform Commercial Code. Except as otherwise provided in the U.C.C., that section permits the parties to choose as the law governing their agreement the law of any state that “bears a reasonable relation” to the transaction. For a discussion of an opinion’s coverage of mandatory choice-of-law
approach in all situations. Some states, for example, have enacted statutes that validate the choice of their law to govern agreements satisfying specified conditions relating to the nature and size of a transaction. The Committee’s previous reports discussed how both the Restatement and statutory validation approaches apply to opinions covering chosen-law provisions. This Supplemental Report discusses only how choice-of-law rules based on the Restatement apply to those opinions.

Courts do not always follow the Restatement in every respect. Perhaps most noteworthy is the failure of some courts (as discussed at infra note 9) to indicate which state is the Default State (“Default State” is defined in the text in the second to last sentence of the second paragraph of Part II of this Supplemental Report) and instead to consider whether giving effect to the agreement will violate a fundamental policy of the state in which they are located (and, if so, sometimes whether that state or the Chosen Law State has a materially greater interest in the issue). See Ruiz v. Affinity Logistics Corp., 667 F.3d 1318 (9th Cir. 2012); In re Hionas, 361 B.R. 269 (Bankr. S.D. Fla. 2006); Peleg v. Nieman Marcus Grp., Inc., 140 Cal. Rptr. 3d 38 (Ct. App. 2012); Welsbach Elec. Corp. v. MasTec N. Am., Inc., 825 N.Y.S.2d 692 (2006) (described in next paragraph of this note).

New York applies common law principles in determining whether to give effect to a chosen-law provision choosing the law of another state. In the past, some courts interpreted New York case law to establish a “center of gravity” test for the enforcement of chosen-law provisions. See, e.g., Car- gill Inc. v. Charles Kowsky Res. Inc., 949 F.2d 51, 55 (2d Cir. 1991) (“New York law allows a court to disregard the parties’ choice when the “most significant contacts” with the matter in dispute are in another state.” (citing Haag v. Barnes, 216 N.Y.S.2d 65 (1961)); Am. Equities Grp., Inc. v. Ahava Dairy Prods. Corp., 01 Civ. 5207 (RWS), 2004 WL 870260 (S.D.N.Y. Apr. 23, 2004) (discussed at infra note 8). More recently, the New York Court of Appeals has taken an approach that is closer to that of the Restatement. See Welsbach Elec. Corp. v. MasTec N. Am., Inc., 825 N.Y.S.2d 692, 694–97 (2006) (applying a “reasonable relationship” test and citing Restatement § 187(2) favorably with a “see generally,” but not determining which state was the Default State and instead simply finding, in giving effect to the choice of Florida law, that the substantive provision at issue was contrary to a New York statute but not so “truly obnoxious” as to be “offensive to a fundamental public policy” of New York). Subsequent lower court decisions applying New York law, however, in some instances (even while purporting to apply the Restatement test) have considered whether New York or the Chosen Law State had the more substantial relationship, rather than simply determining whether a reasonable relationship (as provided in Welsbach) or a substantial relationship (as provided in the Restatement) existed with the Chosen Law State. See, e.g., Am. Express Travel Related Servs. Co. v. Assih, 893 N.Y.S.2d 438, 443–47 (Civ. Ct. 2009) (quoting Restatement section 187(2) in part but applying New York usury law to agreement choosing Utah law because Utah had no “substantial relationship” despite one party’s being domiciled there; finding that New York had the “most significant contacts,” a “strong public policy” against usury, and a “materially greater interest” than Utah in the application of its law); Clever Ideas v. 999 Rest. Corp., No. 06 02302/2006, 2007 WL 3234747 (N.Y. Sup. Ct. Oct. 12, 2007) (holding loan agreement violated New York usury law; not enforcing choice of Illinois law despite one party’s being an Illinois corporation because New York had the “most reasonable relationship”; also finding that New York had “supervening public policy . . . of a fundamental nature” against usury).

3. CAL. CIV. CODE § 1646.5 (WEST 2011); DEL. CODE ANN. tit. 6, § 2708 (2011); N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2010). Opinions on chosen-law provisions that are validated by a statute are discussed in the second and third paragraphs of Section III.E of the 2004 Report. See 2004 Report, supra note 1, at 1496.

Many states with statutes apply choice-of-law rules based on the Restatement when the agreement chooses the law of some other state or otherwise does not meet statutory conditions. See, e.g., Zomba Recording LLC v. Williams, 839 N.Y.S.2d 438 (Sup. Ct. 2007). By way of contrast Texas has a statute that gives effect to an agreement’s choice of another state’s law if specified conditions are met. TEX. BUS. & COM. CODE ch. 271 (West, Westlaw through Chapter 65 of the 2013 Regular Session of the 83d Legislature).
Part II of this Supplemental Report discusses the difficulty of applying choice-of-law rules based on section 187 of the Restatement to both the remedies and choice-of-law opinions. Part III clarifies and provides a fuller explication of the Committee’s views with respect to those opinions.\footnote{This Supplemental Report supersedes the second paragraph of note 70 of the Committee’s 2004 Report and, as it relates to opinions on the effectiveness of the chosen-law provision when the Covered Law is not the Chosen Law (defined in the second paragraph above as the “choice-of-law opinion”), the final paragraph of Section III.E of the 2004 Report. Otherwise, this Report supplements rather than repeats the discussion of opinions on chosen-law provisions in the Committee’s previous reports.}

II. DIFFICULTIES PRESENTED BY CHOICE-OF-LAW RULES BASED ON RESTATEMENT

As indicated above, when the Covered Law is the Chosen Law, the remedies opinion, unless qualified, covers the chosen-law provision as part of its coverage of the enforceability under the Covered Law of all the company’s undertakings in the agreement. When the Covered Law is not the Chosen Law, opinion preparers ordinarily cannot give a remedies opinion on the enforceability of the agreement because enforceability is governed by the law of a state whose law they are not addressing in the opinion letter. As an alternative, they sometimes give a separate opinion—i.e., a choice-of-law opinion—directed solely to the effectiveness of the chosen-law provision under the Covered Law.\footnote{When the Chosen Law and Covered Law are different, an opinion giver may give, together with or in lieu of a choice-of-law opinion, a so-called “as if” opinion that the agreement would be enforceable if it were governed by the Covered Law. As the 1998 Report points out, when the Covered Law State is the state where the company has its headquarters, the opinion recipient has an interest in the enforceability of key provisions of the agreement under the Covered Law because the Covered Law State is a likely place for suit to be brought to enforce the agreement. See 1998 Report, supra note 1, at 635 & n.98; see also 2004 Report, supra note 1, at 1497 n.70 (first paragraph). An “as if” opinion does not address the enforceability of the chosen-law provision’s choice of the Chosen Law State’s law because it treats that provision as if it chose the internal law of the Covered Law State. In addition, an “as if” opinion covers the enforceability of the agreement as interpreted under the Covered Law even though a court, giving the chosen-law provision effect, would interpret the agreement under the Chosen Law.}

To illustrate, if the Chosen Law in a loan agreement is New York law and the Covered Law is Massachusetts law, Massachusetts counsel for the borrower may give the lender an opinion that the agreement’s choice of New York law will be given effect under Massachusetts law.

Paragraph (2) of section 187 of the Restatement is the section opinion preparers ordinarily look to when considering whether a chosen-law provision will be given effect under section 187.\footnote{Paragraph (1) of section 187 of the Restatement is an incorporation by reference provision that applies to issues to the parties to an agreement could have resolved by an explicit provision. To illustrate, section 187(1) applies if an agreement whose Chosen Law is New York provides that a particular term has the meaning accorded to it by the Delaware General Corporation Law, assuming that the issue so addressed could have been resolved by an explicit provision. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. c. See generally William M. Richman & William L. Reynolds, UNDERSTANDING CONFLICT OF LAWS § 74[b][2] (rev. 3d ed. 2002); Peter Hay et al., HORNBOOK ON CONFLICT OF LAWS § 18.2 (5th ed. 2010). The two exceptions to section 187(2) discussed below do not apply to section 187(1).}

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validates the choice by the parties to an agreement of the state law that they want to
govern their rights and duties. The first exception applies when the state whose law
they chose has no substantial relationship to the parties or transaction and no other
reasonable basis exists for the parties’ choice. The second exception applies when
giving effect to the agreement under the Chosen Law would be contrary to a fun-
damental policy of the state whose law would have applied had the agreement not
contained a chosen-law provision (the “Default State”). The second exception only
applies, however, if the Default State has a materially greater interest in the issue
than the Chosen Law State.7

Opinion preparers often will have no difficulty confirming that the first excep-
tion to paragraph (2) does not apply.8 That is because in many transactions the
Chosen Law is the law of a state with which at least one of the parties has a sub-
stantial relationship. For example, if a loan is made by the Boston office of a bank
with its headquarters in Boston to a borrower with its headquarters in New
Hampshire, the agreement usually will choose Massachusetts law as its govern-
ing law, and Massachusetts—i.e., the Chosen Law State—will have a substantial
relationship to the bank.

The determinations required to conclude that the second exception to para-
graph (2) of Section 187 does not apply can be considerably more difficult
than the determination required by the first exception. Those difficulties include:

(i) Determining which state is the Default State. Sections 6 and 188 of the
Restatement set forth the relevant factors, which include the needs of
interstate and international systems, the protection of justified expec-
tations, and the needs of judicial administration.9 In many transac-

7. For the considerations bearing on a determination whether a policy is fundamental, see RESTATE-
MENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (in deciding whether second exception to section
187(2) applies, an “important consideration is the extent to which the significant contacts are
grouped in the [Default State]”).

Ordinarily, choice-of-law rules are applied to each term of the agreement. However, when the second
exception applies to only one of the terms of a contractual provision, a court may decline to apply the
Chosen Law not only to that term but to the contractual provision in its entirety. See, e.g., Feeney v. Dell
Inc., 908 N.E.2d 753 (Mass. 2009) (applying Massachusetts law to arbitration provision in its entirety
(and thereby invalidating it) because term in arbitration provision violated Massachusetts fundamental
policy and that term “permeated” the arbitration provision). (Following its 2009 decision, the Massa-
chusetts Supreme Judicial Court reversed its position that the term in question was invalid in light of
subsequent decisions by the United States Supreme Court. See Feeney v. Dell, Inc., 989 N.E.2d 439

8. Opinion preparers, however, may have more difficulty in particular states. See supra note 2 (de-
scribing in third paragraph different approaches New York courts have taken to the issue addressed
by the first exception when the New York choice-of-law statute does not apply).

Even though, consistent with the Restatement, an opinion addresses whether a sufficient relationship
exists with the Chosen Law State when the agreement is entered into, a court may look at the facts as
they exist later when it considers the dispute. See, e.g., Am. Equities Grp., Inc. v. Ahava Diary Prods.
Corp., 01 Civ. 5207 (RWS), 2004 WL 870260, at *7–9 (S.D.N.Y. Apr. 23, 2004) (New Jersey found to
have no substantial relationship where party whose principal place of business was in New Jersey
moved to New York after entering into the agreement and all other contacts were with New York;
New York also found to have a “materially greater interest” and “strong public policy” against usury).

9. Courts applying section 187(2) do not always state expressly in their opinions that the state
whose fundamental policies they are considering is the Default State (although that may be obvious
tions, states other than the Covered Law State may be the Default State, and the breadth of these factors and their inherent imprecision can (and often do) prevent opinion preparers from being able to identify the Default State with the level of certainty an opinion requires.\textsuperscript{10}

(ii) When the Covered Law State is not the Default State,\textsuperscript{11} determining:

- whether giving effect to the agreement covered by the opinion will be contrary to a fundamental policy of the Default State and, if so,

- whether the interest of the Default State in the issue is materially greater than the interest of the Covered Law State.

Opinion preparers cannot be expected to make these determinations because they require knowledge of the law of a state—i.e., the Default State—that the opinion preparers are not covering in the opinion letter.\textsuperscript{12}

(iii) When the Covered Law State is the Default State but not the Chosen Law State, determining:

- whether giving effect to the agreement would be contrary to a fundamental policy of the Covered Law State (as the Default State) and, if so,

- whether the Covered Law State (as the Default State) has a materially greater interest in the issue than the Chosen Law State.\textsuperscript{13}

in many cases and the courts may be making that determination without saying so in their opinions). See, e.g., Siga Techs., Inc. v. Pharmathena, Inc., 67 A.3d 330, 342 (Del. 2013) (quoting statement in \textit{Abry Partners V, L.P. v. F & W Acquisition LLC}, 891 A.2d 1032, 1047 (Del. Ch. 2006) that second exception to section 187(2) is applicable when “the law of the chosen state will offend a fundamental policy of a state with a materially greater interest” without also indicating that second exception requires reference to state with material greater interest only if that state also is the state whose law would apply if agreement did not contain chosen-law provision).

10. Nevertheless, if the Covered Law is not the Chosen Law and it is clear that no state other than the Covered Law and Chosen Law States could be the Default State, the opinion preparers might be able to give an opinion that the chosen-law provision will be given effect under the Covered Law without determining which state is the Default State. The second exception, by definition, will not prevent the chosen-law provision from being given effect if the Chosen Law State is the Default State. Thus, if the opinion preparers are able to conclude that the only state besides the Chosen Law State that could be the Default State is the Covered Law State, the opinion preparers might be able to give an opinion if they can get by the interpretive problem discussed in paragraph (iii) below and conclude that the agreement is not contrary to the Covered Law State's fundamental policies.

11. The issues addressed in this subparagraph (ii) arise whether or not the Covered Law is the Chosen Law because the law of the Default State is still relevant. If the Covered Law is the Chosen Law, the opinion that would be given is the remedies opinion (discussed in Part III(a) of this Supplemental Report). If it is not, the opinion that would be given is the choice-of-law opinion (discussed in Part III(b) of this Supplemental Report).

12. Moreover, as discussed in paragraph (i) above, the opinion preparers may not be able to identify which state is the Default State with the level of certainty needed to give an opinion and, if the Covered Law State is not the Chosen Law State, may have to deal with the interpretive problem discussed in paragraph (iii) below.

13. As a practical matter, opinion preparers may not even get to this question. Instead, they ordinarily will take an exception if they determine that giving effect to the agreement as interpreted under the law with which they are familiar (i.e., the Covered Law rather than, as required by the Restatement, the Chosen Law) would be contrary to a fundamental policy of the Covered Law State.
The Restatement requires that the agreement be interpreted under the Chosen Law for purposes of determining whether under the second exception to section 187(2) giving effect to an agreement will violate a fundamental policy of the Default State.\textsuperscript{14} While contractual provisions often have the same meaning in different states, that is not always so, and thus whether interpreting the agreement under the Chosen Law will prevent the opinion preparers from giving a choice-of-law opinion will depend on the type of agreement, the matters it covers, and the terminology it uses.\textsuperscript{15} Similarly, the opinion preparers’ lack of knowledge of the policies of the Chosen Law State can prevent them from determining which state has a materially greater interest in the issue because that too requires an assessment of the strength of the interest in the issue of a state (here the Chosen Law State) that is not the Covered Law State.

III. ANALYSIS

(A) When the Covered Law Is the Chosen Law

As discussed above, a remedies opinion (which typically is given on the agreement as a whole when the Covered Law is the Chosen Law) covers, unless otherwise qualified,\textsuperscript{16} the enforceability of the chosen-law provision under the choice-of-law rules of the Covered Law State.\textsuperscript{17} When those rules are based on the Restatement, opinion preparers do not have to indicate in the opinion letter that they have only considered the Covered Law State’s relationship to the parties or the transaction and not the possibility that under the second exception to section 187(2) the fundamental policies of some other state might be relevant.

\textsuperscript{14} The second exception refers to the application of the law of the Chosen Law State, thus requiring a court deciding whether to give effect to the chosen-law provision to consider the consequences of giving effect to the agreement as its terms are interpreted under the Chosen Law. To illustrate, if the agreement requires the company to use its “best efforts” to perform specified obligations, in determining whether the second exception applies, a court would have to consider whether a company’s exercising its “best efforts,” as that phrase is interpreted under the Chosen Law, would be so burdensome as to violate a fundamental policy of the Default State and, if so, whether the Default State has a materially greater interest than the Chosen Law State in the issue.

\textsuperscript{15} If the Covered Law is the Chosen Law, this interpretive problem does not arise because the agreement will be interpreted under the Covered Law.

Giving a choice-of-law opinion based on an assumption that the agreement means what it means under the Covered Law would serve no purpose because it would require essentially the same work as an “as if” opinion (see supra note 5). That is because the lack of judicial or statutory guidance on whether a particular policy is fundamental can make a determination whether a policy of a state is a “fundamental” policy so difficult that the lawyers preparing a choice-of-law opinion based on that assumption would be required to consider, as they would for an “as if” opinion, whether the agreement is contrary to any policy of the Covered Law State.

\textsuperscript{16} When giving an enforceability opinion on an agreement as a whole, some opinion preparers exclude coverage of the chosen-law provision by including an express exception or by describing the law they are covering in a way that makes clear they are not covering the choice-of-law rules of the Covered Law State (for example, by stating that that the law they are covering is the “internal” (some lawyers use “substantive”) law of the Covered Law State).

\textsuperscript{17} See supra note 15 (first paragraph).
under the choice-of-law rules of the Covered Law State. Nevertheless, in light of the considerations discussed in Part II, when another state has a significant relationship with the parties or the transaction, some opinion preparers, to avoid the possibility of a misunderstanding over the opinion’s coverage, include in their opinion letters a statement that they are not addressing the possible application under the Covered Law State’s choice-of-law rules of the internal law of any other state.

(B) When the Covered Law Is Not the Chosen Law

The Committee’s 2004 Report, in the second paragraph of note 70 and the related text, takes the position that, when the Covered Law is not the Chosen Law, a choice-of-law opinion requires the opinion preparers to confirm that the Covered Law State does not have a fundamental policy that would be violated by the agreement. That Report also takes the position that the opinion does not require the opinion preparers to consider, or indicate in the opinion letter that they have not considered, the possible application of the substantive law of any other state. Many lawyers support both of those positions. They point out that whether the Covered Law State is the Default State often will be unclear, that courts in the Covered Law State sometimes apply the Covered Law State’s fundamental policies without determining whether it is the Default State, and that the only state whose fundamental policies they are in a position to address (and that opinion recipients can reasonably expect them to address) is the Covered Law State. They also point out that often the only states that could be the Default State are the Chosen Law State and the Covered Law State and, therefore, that in many transactions the only fundamental policies that could possibly be applicable under the second exception are those of the Covered Law State. Thus, those lawyers when giving choice-of-law opinions rely on the coverage limitation, as read in light of customary practice, as providing a basis for their not stating expressly that they are not covering the fundamental policies of any other state.

18. See the last paragraph of Section III.E of the 2004 Report. See 2004 Report, supra note 1, at 1497–98.
19. As section 1.4(d) of the 1998 Report points out, an opinion giver may not give an opinion that it recognizes will mislead the opinion recipient with regard to a matter covered by the opinion. See 1998 Report, supra note 1, at 602–03. Thus, if the opinion preparers recognize that a provision of the agreement is contrary to a fundamental policy of the state they believe is likely to be the Default State, they should consider whether giving an opinion that the chosen-law provision is enforceable without bringing the issue to the attention of the opinion recipient would be misleading to the recipient.
20. 2004 Report, supra note 1, at 1497–98 & n.70.
22. See supra notes 2 (second paragraph) and 9.
23. The second exception applies only when the Chosen Law State is not the Default State. See supra note 10.
24. The coverage limitation is the statement usually included in a closing opinion limiting the law covered to the law of specified jurisdictions. See 2004 Report, supra note 1, at 601 n.25.
Other lawyers are not comfortable with the above analysis. They point out that an opinion on the effectiveness of a chosen-law provision specifically covers application of the choice-of-law rules of the Covered Law State to the chosen-law provision and take the position that a coverage limitation that states that the opinion letter covers the “law” of a specified state brings within the opinion’s coverage the reference in the second exception to section 187(2) to the fundamental policies of the Default State (even if it is not the Covered Law State). In addition, those lawyers, noting how frequently opinion givers draft their choice-of-law opinions in ways that clearly avoid coverage of the second exception, do not view customary practice as supporting a reading of the coverage limitation that permits giving a choice-of-law opinion without making the recipient aware in some way that the opinion does not cover the possible application, under the Covered Law State’s choice-of-law rules, of the fundamental policies of a state other than the Covered Law State. Finally, they observe that the fundamental policies of the Covered Law State are not relevant to the analysis called for by the second exception to section 187(2)—and hence covering them serves no purpose in that analysis—if the Covered Law State is not the Default State.

The lack of a consensus over the choice-of-law opinion’s coverage of the second exception could lead to misunderstandings regarding the meaning of the opinion. Consequently, many opinion preparers, when giving opinions on the effectiveness of chosen-law provisions that do not choose the Covered Law, to assure that recipients are on notice of the need to consult their own counsel regarding the significance of the second exception, make clear in their opinion letters that they are not covering the possibility that the choice-of-law rules of the Covered Law State might require consideration of the fundamental policies of some other state. In addition, in light of the difficulties discussed above, opinion preparers who do not wish to cover fundamental policies of even the Covered Law State often make clear in their opinion letters that the opinion does not cover the possible application of the second exception, for example by expressly excluding coverage of the fundamental policies of the Covered Law State as well as other states.

25. The Committee recognizes that opinion preparers may make the limited coverage of the opinion clear in various ways, some more detailed than others. They may, for example, include in their opinion letters a summary of the Covered Law State’s choice-of-law rules and either expressly cover only the first exception or expressly exclude coverage of the second exception (at least to the extent it requires consideration of the fundamental policies of another state), or they might simply exclude expressly from the opinion the fundamental policies of states other than the Covered Law State.

As noted in the text above, in many transactions the Chosen Law State and the Covered Law State will be the only states that could be the Default State. In those situations, pointing out that under the second exception the fundamental policies of another state might apply would serve no purpose, and the opinion preparers understandably may decide not to do so.
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